



April 21, 2016

Delivered Via Electronic Mail

Ms. Brittany Martinez
U.S. Environmental Protection Agency
Office of Civil Rights
Mail Code 1201A
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-1000

Re: Administrative Complaint against Alabama Department of Environmental Management, EPA File No. 13R-16-R4

Dear Ms. Martinez:

As you are aware, on August 22, 2013, I requested that the Office of Civil Rights investigate whether the Alabama Department of Environmental (ADEM) is in violation of the financial assistance award condition that provides as follows:

In accepting this assistance agreement, the recipient acknowledges it has an affirmative obligation to implement effective Title VI compliance programs and ensure that its actions do not involve discriminatory treatment and do not have discriminatory effects even when facially neutral. The recipient must be prepared to demonstrate to EPA that such compliance programs exist and are being implemented or to otherwise demonstrate how it is meeting its Title VI obligations.

In EPA's Acceptance of Administrative Complaint letter dated February 24, 2016 regarding the above-referenced matter, EPA agreed that it would investigate two matters, one of which is as follows:

Whether ADEM is complying with the procedural safeguard provision delineated in 40 C.F.R. Part 7 Subpart D, which require recipients of EPA financial assistance to have specific policies and procedures in place to comply with their affirmative non-discrimination obligations.

Complainants submit this analysis and the accompanying exhibits for your consideration and request that they be included in the administrative record.

I. Limitations on ADEM's authority to develop, adopt, and implement policies and procedures to comply with its affirmative non-discrimination obligations.

EPA should recognize that ADEM has several statutory limitations on its ability to develop, adopt, and implement policies and procedures to comply with its affirmative non-discrimination obligations. These limitations do not excuse ADEM's non-compliance with its affirmative non-discrimination obligations. Rather, these limitations represent impediments that must be overcome if ADEM is to continue to receive financial assistance from EPA.

A. ADEM lacks statutory authority to address the adverse discriminatory effects of its permit decisions.

ADEM has asserted that it does not have statutory authority to address the adverse discriminatory effects of its permit decisions. In *Holmes v. Alabama Department of Environmental Management*, EMC Docket No. 98-04, 1998 AL ENV LEXIS 1, 1998 WL 75094 (Ala. Env'tl. Mgmt. Comm'n Feb. 17, 1998) (**Exhibit A**), Holmes and others challenged the issuance of air permits by ADEM to S&C Beef Processors, LLC for its proposed rendering operations and associated boilers at its Montgomery facility. The Hearing Officer summarized the testimony of Ron Gore, Chief of ADEM's Air Division, as follows:

The Department also did not consider racial and economic demographics in deciding whether or not to issue the Permits. The Department does not have statutory authority to make such considerations a part of the permit process. Tr. at 55-56. The U. S. Environmental Protection Agency (EPA) has a division which deals with such issues (commonly called environmental justice issues), through a policy directive issued by the President. The Department is not charged with responsibility for administering this directive, which is not in the form of regulations. Parties complaining of environmental justice issues must go to the EPA. Tr. at 56-58. The EPA does not require the Department to deal with odor as an air pollutant, although the State has chosen to do so in its authorizing statute. EPA does not have any regulations concerning odor emissions. Nonetheless, a party is not precluded from pursuing an environmental justice claim on the basis of odor to the EPA. Id.

Id., 1998 AL ENV LEXIS 1, at *14-15, 1998 WL 75094, at *6. In his conclusions of law, the Hearing Officer held:

Although it is not pled in the Request for Hearing, the Hearing Officer takes notice of Petitioners' contention that the Department should have considered

the racial makeup of the neighborhood in deciding whether or not to issue the Permits. (*See, e. g.*, Intervenor's Exhibit 1, Tab 6, Memorandum from Rep. Alvin Homes). The governing statutes and regulations do not confer on the Department any power to consider such factors in deciding whether or not to issue a permit. Respondent's Exhibit 3 and 4. Again, Ron Gore testified that the Department's interpretation of its regulations is consistent with this absence of delegation, *i.e.* that the Department has no such power.

Id., 1998 AL ENV LEXIS 1, at *30-31, 1998 WL 75094, at *11. *See id.*, 1998 AL ENV LEXIS 1, at *32, 1998 WL 75094, at *12 ("The Department, and the Commission, further lack jurisdiction to consider racial or socioeconomic factors in determining whether or not to issue a permit which otherwise complies with applicable regulations."). The Hearing Officer recommended that the Environmental Management Commission approve the permits issued to S&C Beef Processors, LLC. *Id.*, 1998 AL ENV LEXIS 1, at *34, 1998 WL 75094, at *12. The Commission adopted the Hearing Officer's Proposed Findings of Fact, Conclusions of Law, and Recommendation. *Id.*, 1998 AL ENV LEXIS 1, at *1, 1998 WL 75094, at *1. *See East Central Alabama Alliance for Quality Living v. Alabama Dep't of Env'tl. Mgmt.*, EMC Docket Nos. 03-01 and 03-02, 2003 AL ENV LEXIS 6, *28 (Ala. Env'tl. Mgmt. Comm'n Mar. 13, 2003) ("it clearly appears that ADEM has not been granted the statutory authority to consider disparate racial impact issues where there's an appeal of the granting of a permit.") (**Exhibit B**).

"It is settled law in Alabama that an administrative agency is purely a creature of the legislature and has only those powers conferred upon it by the legislature." *Jefferson County v. Alabama Criminal Justice Info. Ctr. Comm'n*, 620 So. 2d 651, 658 (Ala. 1993). *Accord, Ex parte Crestwood Hosp. & Nursing Home, Inc.*, 670 So. 2d 45, 47 (Ala. 1995). "An administrative agency cannot usurp legislative powers or contravene a statute." *Id. Accord, City of Brundidge v. Alabama Dep't of Env'tl. Mgmt.*, Nos. 2140325/2140342, 2016 Ala. Civ. App. LEXIS 37, *41 (Ala. Civ. App. 2016). An agency may not adopt regulations that subvert or enlarge upon statutory policy. *Ex parte Jones Mfg. Co., Inc.*, 589 So. 2d 208, 210 (Ala. 1991). "A regulation . . . which operates to create a rule out of harmony with the statute, is a mere nullity." *Ex parte Crestwood Hosp. & Nursing Home, Inc.*, 670 So. 2d at 47.

40 C.F.R. § 7.35(b) requires that EPA financial assistance recipients, including ADEM, "shall not use criteria or methods of administering its programs or activities which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex However, the Alabama Legislature has not granted ADEM the authority to consider whether a permit will "have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex." *See e.g.*, Alabama Environmental Management Act, Ala. Code §§ 22-22A-1 to 22-22A-17; Alabama Air Pollution Control Act, Ala. Code §§ 22-28-1 to 22-28-23; Alabama Solid Wastes and Recyclable Materials Management Act, Ala. Code §§ 22-27-1 to 22-

27-18. ADEM is correct that it does not have statutory authority to address the adverse discriminatory effects of its permit decisions. Moreover, ADEM cannot develop, adopt, or implement policies or procedures that will usurp legislative powers or enlarge upon statutory policy. Absent additional authority from the legislature, ADEM cannot develop, adopt, and implement policies and procedures to ensure compliance with 40 C.F.R. § 7.35(b).¹

B. The ADEM Director and his subordinates lack authority to develop environmental policy, including policy to ensure that ADEM complies with its affirmative non-discrimination obligations when issuing environmental permits.

The Alabama Environmental Management Act created the Alabama Department of Environmental Management and transferred to it the powers, duties and functions of pre-existing environmental agencies. Ala. Code § 22-22A-4.

The department shall be under the supervision and control of an officer who shall be designated as the director of the Alabama Department of Environmental Management. * * * The director shall employ such officers, agents and employees as he deems necessary to properly administer and enforce the programs and activities of the department and to fully implement the requirements of this chapter and the intent of the Legislature. All powers, duties and functions transferred to the department by this chapter, *except those specifically granted to the Environmental Management Commission*, shall be performed by the director; provided that the director may delegate the performance of such of his powers, duties and functions, to employees of the department, wherever it appears desirable and practicable in fulfilling the policies and purposes of this chapter.

Ala. Code § 22-22A-4(b). The Environmental Management Commission is specifically granted the duty to “develop environmental policy for the state.” Ala. Code § 22-22A-6(a)(3). Thus, any policies and procedures adopted by the ADEM Director or his subordinates to ensure that ADEM complies with its affirmative non-discrimination obligations when issuing environmental permits

¹ In 2004, ADEM adopted (but did not publish) “Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints.” (**Exhibit C**). The procedure provides for an “investigation” of discrimination complaints but provides for no specific remedies if discrimination is found. On or about April 12, 2016, ADEM adopted and published “ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process.” (**Exhibit D**). This process is a reiteration of Memorandum 108. These procedures do not and cannot provide redress for the adverse discriminatory effects of ADEM permit decisions because ADEM lacks the requisite statutory authority to consider the adverse discriminatory effects of its permit decisions.

must be developed by the Environmental Management Commission. Accordingly, the Director of ADEM and his subordinates have no authority to develop environmental policy for the State and any environmental policies developed by the Director, such as “Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints” (Oct. 18, 2004) (**Exhibit C**) and “ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process” (April 12, 2016) (**Exhibit D**), are *ultra vires* and invalid.

C. Agency statements of general applicability that prescribe policy, or describe the procedure or practice requirements of the agency are invalid unless rulemaking procedures are complied with.

The Alabama Administrative Procedure Act defines a “rule” as a “statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency . . .” Ala. Code § 41-22-3(9).² Any “rules” adopted without substantial compliance with the notice and comment procedures prescribed in Ala. Code § 41-22-5 are invalid. Ala. Code § 41-22-5(d). *See e.g., Ex parte Legal Envtl. Assistance Found., Inc.*, 832 So. 2d 61 (Ala. 2002) (antidegradation implementation procedures adopted without substantial compliance with Ala. Code §§ 41-22-4, -5, and -23, and §§ 22-22A-8(a) and (b), are unlawful); ADEM Policies - Are They Unlawful Rules? (**Exhibit E**).

Any policies or procedures that ADEM may adopt to comply with its affirmative non-discrimination obligations are likely to be “rules” requiring compliance with the notice and comment procedures required by Ala. Code § 41-22-5.³ Absent compliance with the notice and comment procedures prescribed by Ala. Code § 41-22-5, any policies or procedures that ADEM may adopt to comply with its affirmative non-discrimination obligations are likely to be invalid.

² The Environmental Management Commission is specifically granted the duty to “establish, adopt, promulgate, modify, repeal and suspend any rules, regulations or environmental standards for the department which may be applicable to the state as a whole or any of its geographical parts; . . .” Ala. Code § 22-22A-6(a)(2).

³ “Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints” (Oct. 18, 2004) (**Exhibit C**) and “ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process” (April 12, 2016) (**Exhibit D**) are “statement[s] of general applicability that implement[], interpret[], or prescribe[] law or policy, or that describe[] the organization, procedure, or practice requirements of [the] agency . . .” Accordingly, they are “rules.” ADEM did not observe the notice and comment procedures required by Ala. Code § 41-22-5. Accordingly, those procedures are invalid.

II. ADEM's historical defenses to claims of adverse discriminatory effects resulting from permit decisions are meritless.

In the course of EPA's investigation of whether ADEM has specific policies and procedures in place to comply with its affirmative non-discrimination obligations, EPA will undoubtedly review the historical defenses asserted by ADEM against claims of discriminatory effects resulting from its permit decisions. As discussed below, those defenses are meritless.

A. ADEM's claim that it does not make siting decisions is not a meritorious defense to a claim of discriminatory effects resulting from permit decision.

ADEM has repeatedly asserted that facility siting decisions are what cause adverse discriminatory effects and that it does not make facility siting decisions. For example, as recently as January 2016, ADEM said:

Any alleged environmental justice concerns would come as a result of the siting of the landfill. The Department, however, does not site landfills; that responsibility lies with the local host government.

Response to Comments - City of Dothan Landfill Permit Modification Permit No. 35-06 (Jan. 8, 2016) (**Exhibit F**), at Response to Comment #2. *Accord*, Response to Comments - City of Dothan Landfill Permit Renewal, Permit No. 35-06 (Oct. 21, 2013) (**Exhibit G**), at Response to Comment # 7; Summation of Comments Received and Response-to-Comments - Proposed Arrowhead Landfill Modification Permit 53-03 (Feb. 3, 2012) (**Exhibit H**), at Response to Comments at 7; Summation of Comments Received and Response-to-Comments - Proposed Arrowhead Landfill Renewal Permit 53-03 (Sep. 27, 2011) (**Exhibit I**), at Response to Comments at 13; Summation of Comments Received and Response-to-Comments - Perry County Associates Landfill Uniontown, Perry County, Alabama (July 20, 2009) (**Exhibit J**), at Response to Comments 12-15; Summation of Comments Received and Response-to-Comments - Tallassee Waste Disposal Center, Tallapoosa County, Alabama (Oct. 20, 2003) (**Exhibit K**), at Response to Comment 2.⁴

⁴ In addition, ADEM has asserted the following:

The United States Court of Appeals, for the 11th Circuit, whose geographic jurisdiction encompasses the states of Alabama, Georgia and Florida, held in a Georgia case (Rozar v. Mullis, 85 F.3d 556) involving alleged discrimination regarding the siting of a landfill, that "it was [the] county, not EPD [Georgia Environmental Protection Division], which selected site, and principal responsibility of EPD lay in ascertaining technical suitability of already chosen site."

EPA clearly rejected ADEM's position in June 2000. EPA explained:

Some have argued that the issuance of environmental permits does not "cause" discriminatory effects. Instead, they claim that local zoning decisions or siting decisions determine the location of the sources and the distribution of any impacts resulting from the permitted activities. However, in order to operate, the source's owners must both comply with local zoning requirements and obtain the appropriate environmental permit.

In the Title VI context, the issuance of a permit is the necessary act that allows the operation of a source in a given location that could give rise to the adverse disparate effects on individuals. Therefore, a state permitting authority has an independent obligation to comply with Title VI, which is a direct result of its accepting Federal assistance and giving its assurance to comply with Title VI. In accordance with 40 CFR 7.35(b), recipients are responsible for ensuring that the activities authorized by their environmental permits do not have discriminatory effects, regardless of whether the recipient selects the site or location of permitted sources. Accordingly, if the recipient did not issue the permit, altered the permit, or required mitigation measures, certain impacts that are the result of the operation of the source could be avoided. The recipient's operation of its permitting program is independent of the local government zoning activities.

Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI

Summation of Comments Received and Response-to-Comments - Tallassee Waste Disposal Center, Tallapoosa County, Alabama (Oct. 20, 2003) (**Exhibit K**), at Response to Comment 3. ADEM misrepresents the holding of the Court. The Court held that the district court's grant of summary judgment in favor of the State was due to be affirmed because of "the complete absence of any showing of discriminatory conduct by the state defendants, coupled with the apparent abandonment of any such claims by concession during oral argument." *Id.* at 564. Absent any evidence that the State's permit decision or site approval was motivated by racial animus, the State was entitled to summary judgment as a matter of law. Moreover, the court's decision is inapposite to administrative claims for discriminatory effects. In an *intentional* discrimination case, one must prove that the defendant was motivated by racial or other prohibited animus; it is not enough to show discriminatory effects. In an administrative claim for discriminatory effects, racial or other prohibited animus is irrelevant.

Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39650, 39691 (June 27, 2000).

Accordingly, ADEM's frequent assertion that facility siting decisions are what cause adverse discriminatory effects and that it does not make facility siting decisions is not a meritorious defense to a claim of adverse discriminatory effects resulting from a permit decision.

B. ADEM's claim that it does not intentionally discriminate is not a meritorious defense to a claim of adverse discriminatory effects resulting from a permit decision.

On at least one occasion, ADEM has asserted that it does not intentionally discriminate in its permitting process. ADEM has said:

A number of commentors quoted extensively from and referred specifically to the recommendations of the USEPA Office of Civil Rights Investigative Report for Administrative Complaint File No. 28R-99-R4 (Yerkwood Complaint) June 2003. However, the cover letter accompanying said report also contains the following excerpt: "EPA has found no direct evidence of intentional discrimination in its investigation of ADEM's permitting process for municipal solid waste landfills in Alabama as it relates to location of landfills. In fact direct evidence indicates ADEM does not choose the location of landfill sites in Alabama and confines its analysis of permit applications to technical suitability of sites already chosen by local governments. In analyzing the technical suitability of a landfill site ADEM did not (and does not) consider race or any other socio-economic factor relating to the processing of landfill applications."

Summation of Comments Received and Response-to-Comments - Tallassee Waste Disposal Center, Tallapoosa County, Alabama (Oct. 20, 2003) (**Exhibit K**), at Response to Comment 3.

While ADEM may not engage in intentional discrimination, Title VI also prohibits unintentional discriminatory effects. As mentioned above, 40 C.F.R. § 7.35(b) prohibits ADEM from using criteria or methods of administering its program(s) in a manner which has the effect of subjecting individuals to discrimination on the basis of race. "Frequently, discrimination results from policies and practices that are neutral on their face, but have the effect of discriminating. Facially-neutral policies or practices that result in discriminatory effects violate EPA's Title VI regulations unless it is shown that they are justified and that there is no less discriminatory alternative." *Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits* (EPA, Feb. 5, 1998) at 2 (footnote omitted); *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs*

(Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance), 65 Fed. Reg. 39650, 39688 (June 27, 2000).

Accordingly, ADEM's assertion that it does not intentionally discriminate in its permitting process is not a meritorious defense to a claim of adverse discriminatory effects resulting from a permit decision.

C. ADEM's assertion that it complies with applicable state environmental regulations is not a meritorious defense to a claim of adverse discriminatory effects resulting from a permit decision.

ADEM has repeatedly asserted that compliance with environmental standards ensures that adverse discriminatory effects will not occur. For example, ADEM has said:

The Department has determined the proposed permit complies with all ADEM solid waste regulations which are consistent with EPA'S RCRA Subtitle D regulations. The Subtitle D regulations were designed to control ground and surface water contamination, to control air pollution caused by landfill gas emissions, to control the attraction of rodents, flies, and other disease vectors, and to minimize odors. Compliance with the terms and conditions of the proposed permit is expected to result in the protection of human health and the environment.

At this time, records indicate that the Dothan Sanitary Landfill (Permit No. 35-06) has no significant noncompliance issues with its solid waste permit, thus there is no basis to conclude that the Permittee will not comply with the terms and conditions of its permit renewal. Should the Permittee fail to comply with its permit, the Department is committed to vigorously enforcing the terms and conditions of the permit.

Response to Comments - City of Dothan Landfill Permit Modification Permit No. 35-06 (Jan. 8, 2016) (**Exhibit F**), at Response to Comment #2. *Accord*, Summation of Comments Received and Response-to-Comments - Proposed Arrowhead Landfill Modification Permit 53-03 (Feb. 3, 2012) (**Exhibit H**), at Response to Comments at 7; Letter from Lance LeFleur, Director of ADEM, to Rafael DeLeon Director of EPA OCR, Re: EPA File No. 01R-12-R4 (Arrowhead Landfill) (July 19, 2012) (**Exhibit L**), at 2; Summation of Comments Received and Response-to-Comments - Proposed Arrowhead Landfill Renewal Permit 53-03 (Sep. 27, 2011) (**Exhibit I**), Response to Comments at 13; Summation of Comments Received and Response-to-Comments - Perry County Associates Landfill Uniontown, Perry County, Alabama

(July 20, 2009) (**Exhibit J**), at Response to Comments 12-15; Summation of Comments Received and Response-to-Comments - Proposed Perry County Associates Landfill, Uniontown, Perry County, Alabama (July 6, 2006) (**Exhibit M**), at Response to 16-18.

However, compliance with environmental regulations is not *prima facie* evidence of the absence of adverse disparate impacts. “EPA believes that presuming compliance with civil rights laws wherever there is compliance with environmental health-based thresholds may not give sufficient consideration to other factors that could also adversely impact human health.” *Draft Policy Papers Released for Public Comment: Title VI of the Civil Rights Act of 1964: Adversity and Compliance With Environmental Health-Based Thresholds, and Role of Complainants and Recipients in the Title VI Complaints and Resolution Process*, 78 Fed. Reg. 24740, 24742 (Apr. 26, 2013). For example, “the existence of hot spots, cumulative impacts, the presence of particularly sensitive populations that were not considered in the establishment of the health-based standard, misapplication of environmental standards, or the existence of site-specific data demonstrating an adverse impact despite compliance with the health-based threshold” may have to be considered in determining whether an adverse disparate impact exists. *Id.* See *Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance)* and *Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance)*, 65 Fed. Reg. 39650, 39680 (June 27, 2000) (“A recipient’s Title VI obligation exists in addition to the Federal or state environmental laws governing its environmental permitting program.”); *Draft Title VI Guidance Documents Questions and Answers* at 4 (“A recipient’s Title VI obligation exists independent from Federal or state environmental laws governing its permitting program. Recipients may have policies and practices that are compliant with Federal or state regulations but that have discriminatory effects (such as an adverse disparate impact) on certain populations based on race, color, or national origin, and are therefore noncompliant with Title VI.”).

Accordingly, ADEM’s frequent assertion that it complies with applicable state environmental regulations is not a meritorious defense to a claim of adverse discriminatory effects resulting from a permit decision.

III. Conclusion

“Memorandum 108: Procedure for Title VI or Environmental Justice Filing of Discrimination Complaints” (Oct. 18, 2004) (**Exhibit C**) and “ADEM Civil Rights and Environmental Justice Complaint Reporting and Investigating Process” (April 12, 2016) (**Exhibit D**) are invalid and should not be regarded as sufficient to demonstrate that ADEM is complying with the procedural safeguard provision delineated in 40 C.F.R. Part 7 Subpart D. Moreover, ADEM’s historical defenses against claims of adverse discriminatory effects are

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without merit and should not be regarded as sufficient to demonstrate that ADEM is complying with its affirmative obligation to implement an effective Title VI compliance program.

Complainants request that EPA consider this analysis and the accompanying exhibits when determining “[w]hether ADEM is complying with the procedural safeguard provision delineated in 40 C.F.R. Part 7 Subpart D, which require recipients of EPA financial assistance to have specific policies and procedures in place to comply with their affirmative non-discrimination obligations. Complainants further request that this analysis and the accompanying exhibits be made part of the administrative record in the above-referenced investigation.

Sincerely,

A handwritten signature in cursive script, appearing to read "David A. Ludder".

David A. Ludder
Attorney for Complainants